

**West 73rd St. LLC v Portofino Upper W. Side LLC**

2023 NY Slip Op 31845(U)

May 25, 2023

Supreme Court, New York County

Docket Number: Index No. 653671/2022

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 41

WEST 73RD STREET LLC,

Index No. 653671/2022

Plaintiff

- against -

DECISION AND ORDER

PORTOFINO UPPER WEST SIDE LLC and  
ROEL KUNST,

Defendants

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

In November 2021, plaintiff acquired a building from nonparty 104 West 73rd Street, LLC, and assumed its current leases and related contracts, including a commercial lease with defendant tenant Portofino Upper West Side LLC and a guaranty with defendant Kunst, the tenant's sole member and manager. Plaintiff and defendants subsequently entered a surrender agreement, dated March 2, 2022, that required the tenant "to vacate and surrender possession of the Premises vacant and substantially broom clean on or before the Effective Date." Aff. of Raul Escarza Ex. E ¶ 1. The agreement further defines the "Effective Date" as "July 1, 2022." Id. ¶ 4.

Plaintiff now moves for summary judgment on Portofino Upper West Side's breach of the surrender agreement and Kunst's breach of the guaranty. C.P.L.R. § 3212(b). Defendants cross-move for

summary judgment dismissing the complaint and for summary judgment on Portofino Upper West Side's counterclaim for plaintiff's breach of the lease. Id. The court denies plaintiff's motion and grants defendants' cross-motion as follows.

## II. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff maintains that Portofino Upper West Side failed to surrender the premises according to the parties' agreement because the tenant delivered the keys to a neighboring restaurant manager rather than to plaintiff's property manager, Raul Escarza, or superintendent, Michael Cronin. The parties dispute whether the restaurant manager was plaintiff's employee or otherwise was authorized to accept the keys. Yet the surrender agreement did not obligate the tenant to deliver the keys to plaintiff, nor require its acceptance of the tenant's surrender. Aderans & Alfieri, Inc. v. Rudes, 136 A.D.2d 519, 519 (1st Dep't 1988). Therefore the tenant's actions did not violate the agreement, regardless whether the manager was plaintiff's employee. Id.

To the extent plaintiff insists that the tenant failed to vacate the premises because it did not remove a tanning bed, the surrender agreement unambiguously provides that "any property, including equipment, remaining in the Premises shall be deemed abandoned." Escarza Aff. Ex. E ¶ 1. Thus plaintiff fails to

demonstrate its prima facie claim.

On the other hand, Kunst presents and authenticates text messages between him and Escarza and invoices substantiating Kunst's attestation that the tenant cleaned and vacated the premises on the effective date. In fact, on the following business day, Escarza invited Kunst to view plaintiff's ongoing demolition work, demonstrating plaintiff's acceptance of the tenant's surrender by operation of law. Riverside Research Inst. v. KMGa, Inc., 68 N.Y.2d 689, 691 (1986); Bay Plaza Estates, Inc. v. New York Univ., 257 A.D.2d 472, 473 (1st Dep't 1999). Plaintiff points to no other evidence suggesting that defendants failed to vacate and surrender the premises timely. Therefore the court denies plaintiff's motion for summary judgment. C.P.L.R. § 3212(b).

### III. DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Based on the evidence set forth above, the court grants defendants' cross-motion for summary judgment dismissing the complaint. Their cross-motion on Portofino Upper West Side's counterclaim seeks the return of the tenant's security deposit. Plaintiff maintains that it may apply the security deposit to the tenant's rent arrears. The surrender agreement provides, however, that "in consideration of Tenant's vacating and surrendering possession of the Premises on or before the Effective Date, Landlord shall forgive Tenant's rent arrears as

of the date hereof, and Landlord shall release Tenant and Guarantor from any further liability under the Lease and Guarantee." Escarza Aff. Ex. E ¶ 2. Since plaintiff waived the tenant's rent arrears in consideration of its timely surrender of the leased premises, no balance remains to which to apply the security deposit.

Plaintiff insists that, regardless of the surrender agreement, plaintiff is entitled to the security deposit based on the tenant's default in the payment of rent under the lease. The lease provides that:

Owner may use, apply or retain the whole or any part of the security so deposited to the extent required for the payment of any rent and additional rent or any other sum which Owner may expend or may be required to expend by reason of Tenant's default in respect of any of the terms, covenants, and conditions of this lease, including but not limited to, any damages or deficiency in the re-letting of the premises, whether such damages or deficiency accrued before or after summary proceedings or other re-entry by Owner. In the event that Tenant shall fully and faithfully comply with all of the terms, provisions, and covenants, and conditions of this lease, the security shall be returned to Tenant after the date fixed as the end of the Lease and after delivery of entire possession of the demised premises to Owner.

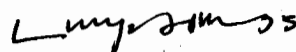
Escarza Aff. Ex. B art. 31. The lease expressly limits plaintiff's use of the security deposit for rent, additional rent, or expenses incurred due to the tenant's default. Yet plaintiff does not claim that it applied the security deposit to the tenant's outstanding balance before waiving any rent arrears. Nor does plaintiff claim other expenses arising from "any damages or deficiency in the re-letting of the premises" to which the

deposit may be applied. Id. Therefore, absent a contractual provision that designates the security deposit as liquidated damages for plaintiff's initial default, Rivertower Assoc. v. Chalfen, 153 A.D.2d 196, 199 (1st Dep't 1990), Portofino Upper West Side is entitled to a return of its \$20,500.00 security deposit.

IV. CONCLUSION

For the reasons explained above, the court denies plaintiff's motion and grants defendants' cross-motion for summary judgment. C.P.L.R. § 3212(b). The court dismisses the complaint and awards a judgment in favor of defendant Portofino Upper West Side LLC and against plaintiff for \$20,500.00 plus interest at 9% per year from July 2, 2022, the day after defendants vacated and surrendered the premises. C.P.L.R. §§ 5001, 5004. The Clerk shall enter the judgment specified.

DATED: May 25, 2023



LUCY BILLINGS, J.S.C.

LUCY BILLINGS  
J.S.C.